# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 12, 2004 |
| v | No. 244315<br>Oakland Circuit Court |
| ROSE LAVERNE CURRY,<br><br>Defendant-Appellant. | LC No. 02-183699-FC |

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). The trial court sentenced defendant to two concurrent terms of nine to twenty years in prison. Defendant now appeals as of right. We affirm.

Defendant's convictions stem from an assault by defendant on the five-year-old victim in December 2001. The victim's mother provided home health care to defendant. On the date of the assault, defendant was watching the victim while the victim's mother went to work. The victim testified at trial that while she was at defendant's house, defendant "licked her pee-pee," forced her to get undressed, and forced her to "lick [defendant's] pee-pee."

Defendant first argues on appeal that there was insufficient evidence of penetration to support her convictions of two counts of first-degree criminal sexual conduct. A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

MCL 750.520b(1)(a) prohibits one from engaging in sexual penetration with another person who is under thirteen years of age. MCL 750.520a(o) defines "sexual penetration":

> "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

In *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992), this Court held that an act of cunnilingus, by definition, involved an act of sexual penetration. Citing *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987), the *Legg* Court stated:

> The *Harris* Court, after reviewing several dictionary definitions of "cunnilingus," concluded that "it is evidence that cunnilingus requires the placing of the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself [sic], or the mons pubes [sic]." 158 Mich App 470. The complainant said that defendant touched "[t]he part [of her body] that I go to the bathroom with" with his mouth. This testimony supported the verdict. [*Legg*, *supra* at 133.]

Here, the five-year-old victim testified that defendant "licked her pee-pee" and that she "licked" defendant's "pee-pee." The victim also testified that "pee-pee" comes out of her "pee-pee." This evidence of mouth to genital contact by defendant to the victim and by the victim to defendant satisfies the definition of "cunnilingus" set forth in *Legg*, *supra*, which in turn satisfies the definition of "sexual penetration" under MCL 750.520a(o). Sufficient evidence was produced to convict defendant.

Defendant next argues on appeal that the trial court erred in excluding the testimony of the home health aid that was caring for defendant at the time of trial. Defendant claims that the aid's testimony was relevant to defendant's physical limitations. We review the decision to exclude evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Starr*, 457 Mich 490; 497; 577 NW2d 673 (1998). Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401.

The assault on the victim occurred in December 2001, and the victim testified that she and defendant were standing up when it happened. Subsequent testimony from almost all witnesses at trial concerned whether defendant was capable of standing unassisted at the time of the assault. The home health aid's testimony went only to defendant's physical limitations in May of 2002, five months after the assault. Because of its removal in time from the date of the assault, the aid's testimony was irrelevant. The testimony did not tend to make the fact that defendant could stand unassisted long enough to assault the victim in December 2001, more or less probable. The trial court did not abuse its discretion in excluding Hubbard's testimony.

Defendant next claims on appeal that she was denied effective assistance of counsel when defense counsel misinformed her, during plea negotiations, regarding the minimum sentence defendant faced upon conviction. Defendant claims that this misinformation undermined her ability to make an intelligent decision regarding whether to proceed with the trial or to plead guilty.

Because defendant did not move for a new trial and the trial court conducted no evidentiary hearing, we review this issue only to the extent that claimed counsel mistakes are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

Generally, to establish ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Toma*, *supra*, citing *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). The defendant must further demonstrate that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Counsel's performance must be measured without the benefit of hindsight. *Rockey*, *supra* at 76.

When a plea offer is made to a defendant, counsel must consult with his or her client and explain the matter to the extent reasonably necessary to permit the client to make an informed decision. MRPC 1.2(a); MRPC 1.4(b); *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). The test is whether the attorney's assistance enabled the defendant to make an informed and voluntary choice between trial and a guilty plea. *Id.*

Defendant argues that because she was misinformed regarding the minimum sentence range under the sentencing guidelines, she was not aware of how high the stakes were in proceeding with the trial instead of taking the proffered plea, and thus, her ability to make an intelligent decision about whether to plead guilty or go to trial was compromised.

Defendant was charged with first-degree criminal sexual conduct involving a child under thirteen, MCL 750.520b(1)(a), which is classified as a Class A felony. MCL 777.16y. A PRV of zero and an OV of sixty yields a minimum sentence range of fifty-one to eight-five months. MCL 777.62. Apparently, this was the scoring as it stood halfway through defendant's trial and this was the information given to defendant regarding the minimum sentence that she could receive upon conviction. Upon conviction, however, defendant was informed that the guidelines called for a minimum sentence range of 81 to 135 months. While defendant claims this constituted misinformation, it was not serious. The thirty-month difference between the minimum sentence referred to during plea negotiations and the minimum sentence referred to at sentencing was apparently the result of the scoring of PRV 7 for a concurrent felony conviction. MCL 777.62. Once the total OV was corrected at sentencing from sixty to forty-five, and PRV 7 was scored for a concurrent felony conviction, which variable could not be correctly scored until the conclusion of trial, the minimum sentence range jumped to 81 to 135 months. MCL 777.62. Thus, in actuality, defendant was not misinformed. She was told mid-trial that the sentencing guidelines provided a minimum sentence range starting at fifty-one months. At that point in the trial, before she was convicted of two concurrent felonies, that is precisely what the guidelines would have dictated. The sentencing guidelines changed only upon her conviction of two counts of first-degree criminal sexual conduct.

Defendant's reliance on *United States v Day*, 969 F2d 39 (CA 3, 1992), is misplaced. Unlike the defendant in *Day*, defendant was not offered a particular sentencing recommendation by the prosecution or a particular length of sentence by the trial court. The trial court indicated that it had no idea what length sentence it would impose but that a plea may result in defendant being put on home confinement as opposed to being sentenced to jail time. Bearing this in mind,

defendant was not misinformed regarding the consequences of the decision to go to trial. As she was informed by her counsel, her decision to go to trial resulted in a prison sentence upon her conviction and not home confinement. Because defendant was not misinformed by her counsel regarding the sentence she could expect to receive upon her conviction, her counsel's performance did not fall below an objective standard of reasonableness under prevailing professional norms, and thus, we conclude defendant was not deprived of the effective assistance of counsel.

Finally, defendant claims on appeal that her sentence of nine to twenty years in prison on each count was disproportionate and constituted cruel and unusual punishment. The interpretation of statutory sentencing guidelines and legal questions presented by application of the guidelines are subject to de novo review. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003). Under the sentencing guidelines act, a court must impose a sentence in accordance with the appropriate sentence range unless there is a substantial and compelling reason for departing from this range. MCL 769.34(2); *Babcock*, *supra* at 255. Because defendant does not assert that the sentencing guidelines were scored in error or that the trial court decided her sentence on the basis of inaccurate information, and because the minimum sentence imposed on defendant falls within the sentencing guidelines range, defendant's sentence must be affirmed by this Court. MCL 769.34(10); *Babcock*, *supra* at 261.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra